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No. 75-612

IN THE

Supreme Court of the United States

GRADY QUICKSEY
Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. _____

IN THE

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GRADY QUICKSEY
Petitioner,

vs.

UNITED STATES OF AMERICA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States

Your petitioner, Grady Quicksey, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in this cause on July 25, 1975.

OPINION BELOW

The opinion of the Court of Appeals is reported in Fed. (2nd) . A copy of the opinion and judgment of the Court of Appeals is appended as Exhibit I.

JURISDICTION

Jurisdiction to review by writ of certiorari the judgment of said Court of Appeals entered July 25, 1975, is invoked under the provisions of 28 U.S.C.A., Section 1254.

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The basis for Federal jurisdiction in the United States District Court was by virtue of an indictment returned against Petitioner by the Grand Jury charging Petitioner with violations of Section 846, Title 21 of the United States Code; Section 1952, Title 18, of the United States Code; Section 841 (a) (1), Title 21 of the United States Code; Section 812, Title 21 of the United States Code and Section 848, Title 21, of the United States Code.

STATEMENT OF THE CASE

Petitioner was indicted in a ten count indictment, however, Count 3 was later dismissed. The first count charged him, along with three others, with violation of Title 18, Section 1952; Title 21, Section 812; Title 21, Section 841 and Title 21, Section 846 in that they conspired and traveled through interstate in the heroin selling business.

The remaining eight counts charge Petitioner alone. Count two charged Petitioner with a violation of Title 21, Section 841, to-wit: interstate travel with intent to obtain and promote an unlawful narcotics business enterprise and knowingly performing such acts to facilitate the carrying on said unlawful activity; in violation of Title 18, Section 1952, United States Code. Count three was dismissed by the trial judge. Counts 4, 5, and 6 charge Petitioner with violation of Title 21, Section 841 (a) (1), United States Code by knowingly and unlawfully possessing and distributing heroin. Counts 7, 8 and 9 charge

the Petitioner with violating Title 21, Section 841 and Title 18, Section 1952, United States Code, by causing travel in interstate commerce with intent to promote and carry on an unlawful narcotics business and thereafter did unlawfully and knowingly perform such acts facilitating the carrying on of said unlawful activity. Count 10 charges Petitioner with violation of Title 21, Section 848, United States Code, by carrying on a illegal narcotics enterprise and from which continuing series of violations, the Petitioner obtained substantial income and resources.

On Tuesday, February 5, 1974, Petitioner was adjudged guilty on all nine counts (count 3 dismissed), and was sentenced on the first count to fifteen years imprisonment, with a special parole term of three years, in addition to such term of imprisonment, and fined the sum of twenty-five thousand dollars ($25,000), to five years on the second count and fined ten thousand dollars ($10,000), which sentence runs concurrently with the fifteen year sentence under the first count, to fifteen years, on the fourth count, with a special parole of three years in addition to such term of imprisonment and fined twenty-five thousand dollars ($25,000), said sentence to run consecutively to the sentence imposed under count one, to fifteen years on the fifth count, with a special parole term of three years in addition to such term of imprisonment, and fined twenty-five thousand dollars ($25,000), said sentence to run concurrently with the sentence imposed under count four, to fifteen years on the sixth count, with a special parole term of three years in addition to such term of imprisonment, fined twenty-five thousand dollars ($25,000), said sentence to run concurrently with the sentence imposed under count one, to five years on the seventh count, fined ten thousand dollars ($10,000) under the provisions of Section 1952 of Title 18 of the United States Code, said sentence to run concurrently with the sentence imposed under count one, to five years on the eighth count under the provisions of Section 1952 of Title 18 of the United States Code, fined ten thousand dollars ($10,000), said

sentence to run concurrently with the sentence imposed under count one, to five years on the ninth count, fined ten thousand dollars ($10,000) under the provisions of Section 1952 of Title 18 of the United States Code, said sentence to run concurrently with the sentence imposed under count one, to thirty years on count ten, fined the sum of one hundred thousand dollars ($100,000) with all heretofore imposed sentences to run concurrently with this sentence, with a special provision that Section 4202, Title 18, (parole) not apply. Petitioner thereafter filed a Notice of Appeal to the Circuit Court. The Petitioner is presently incarcerated in the Federal Penitentiary in Springfield, Missouri.

The evidence taken in the trial of this case, over the objection of the defendant, was largely hearsay. It will be the contention of the Petitioner that such hearsay admitted into evidence was improper, prejudicial, inflammatory and inadmissible. Petitioner concedes that while hearsay based on the co-conspirators exception to the hearsay rule is admissible, the conspiracy itself and Petitioners participation in it must prima facie be shown. This, Petitioner contends was not done prior to the admissibility of the hearsay. Hearsay was initially admitted to show a conspiracy which showing would make hearsay admissible. As is evident, this was circuitous, allowing hearsay by its own bootstraps, to bring itself to the level of admissible evidence. Here the Court instructed the jury that evidence that would otherwise be hearsay that was made by a co-conspirator may be considered by the jury only after the jury have first found that there was conspiracy beyond a reasonable doubt. Petitioner contends the determination of the existence of a conspiracy is a matter of law and not a matter of fact, and as such, it was for the Court to determine the existence of a conspiracy and not the jury.

A Government witness, Julia Jean Monroe, who is also a confessed drug addict, testifying in regard to count nine, emphatically denied the subject in question was heroin.

Her testimony was based on actual experience, having used some of the same substance in question. However, the court instructed the jury that it (jury) could infer that the substance in question was heroin. That instruction placed the burden of deciding whether the substance in question was or was not heroin, squarely on the shoulders of the lay jury, in the face of conflicting testimony from the Governments only witness as to count nine.

The Government claimed on count ten that the Petitioner violated Title 21, Sections 841 (a), 843 (b) and 846, United States Code, which violations were a part of a continuing series of violations and from which the appellant obtained substantial income and resources. However, no testimony was offered by the Government, (appellant did not testify), as to the total amounts of money appellant received from the alleged violation nor was any evidence offered as to appellant's yearly gross adjusted income. The Government did offer speculative testimony as to money amounts involved in isolated overt acts, but nothing the Government offered could prove, nor could the jury infer from such testimony so offered by the Government, that Petitioner received substantial income or resources from said violations. Therefore, the very heart of the statute under which count ten is based, ie "from which such person obtains substantial income or resources," was never put in issue by the Government and consequently, no evidence was introduced as to, 1. Petitioner's gross adjusted income and, 2. the income Petitioner derived from the alleged violation of Title 21, Section 848 of the United States Code. Consequently, Petitioner assigns error to his conviction on Count ten because of insufficient evidence.

QUESTIONS PRESENTED

FIRST: DID THE COURT ERR IN ADMITTING HEARSAY PRIOR TO HIS DETERMINATION, BASED ON PROOF ALIUNDE, THAT A CONSPIRACY EXISTED AND APPELLANT WAS PART OF THAT CONSPIRACY?

SECOND: DID THE COURT ERR IN REFUSING PETITIONER'S MOTION TO DISMISS COUNT NINE BASED ON THE GOVERNMENTS FAILURE TO PROVE A MATERIAL ELEMENT?

THIRD: DID THE COURT ERR BY REFUSING PETITIONERS MOTION TO DISMISS COUNT TEN, BASED ON INSUFFICIENCY OF EVIDENCE?

STATUTES INVOLVED

Involved herein are Title 18, 371; Title 21, Section 812; Title 21, Section 841 and Title 21, Section 848.

ARGUMENT

REASONS FOR GRANTING THE WRIT

FIRST: DID THE COURT ERR IN ADMITTING HEARSAY PRIOR TO HIS DETERMINATION?

Evidence admitted at the trial on all counts was for the most part hearsay; while appellant concedes that evidence amounting to hearsay relating to the furtherance of the conspiracy and made by a co-conspirator, may be admissible, *Dutton v Evans*, 400 U.S. 74 (1970), appellant contends that the existence of a conspiracy and his participation in it must be established before any evidence of conversation of co-conspirators outside appellants presence is admissible against him, *U.S. v Plata*, 361 F2d 958 (7th Cir., 1966), and evidence that a conspiracy existed, must be restricted to proof aliunde. *U.S. v Spanas*, 462 F2d, 1012 (9th Cir. 1972); *Sendejas v U.S.*, 428 F3d 1040 (9th Cir. 1970); *U.S. v Geaney*, 417 F2d 1116 (2nd Cir., 1969); *U.S. v Nall*, 437 f2d 1177 (2nd Cir., 1971). While the appellant concedes that independent evidence linking declarant to appellant need not be so clear and convincing as to compel, in absence of con-

tradiction a finding of fact sought to be proved. *U.S. v Ragland*, 375 f2d 471 (2nd Cir., 1967), appellant does contend that here the independent evidence offered to the existence of a conspiracy is remarkably insufficient to establish a prima facie conspiracy in fact, hence hearsay statements which are admissible after the conspiracy has, by proof aliunde, been shown were here improperly admitted.

In assessing evidence of existence of conspiracy and each defendant's connection with it, hearsay statements of other alleged co-conspirators must be excluded from consideration; only when the trial court finds that there is enough evidence of conspiracy to connect a particular person with it may hearsay statement made by co-conspirators be used against him. *U.S. v DeCavalcante*, 440 f2d 1264 (3rd Cir., 1971). But these declarations are admissible only where there is proof aliunde that the conspiracy exists and appellant is connected with the conspiracy. Otherwise, hearsay would lift itself by its own boot straps to the level of competent evidence. *Glasser v U.S.*, 315 (U.S. 60, 1942). The existence of the conspiracy charged cannot be established against an alleged conspirator by evidence of the acts or declarations of his alleged co-conspirator done or made in his absence. *Thomas v U.S.* 57 f2d 1039 (10th Cir., 1932).

Courts have generally agreed that the trial judge must believe that a conspiracy has been proven before hearsay declarations of co-conspirators are submitted for the juror's consideration. The court in *U.S. v Geaney*, 417 f2d 1116, (2nd Cir. 1969), held that standard to be "whether the proof other than the hearsay declaration afforded reasonable grounds to find that the appellant participated in a common venture with the declarant." Here, it is contended that the trial court made no such determination prior to allowing the hearsay evidence in, nor did he, except in a few instances, allow such hearsay evidence in "subject to connection." Hence, appellant was severely prejudiced by the "flooding" of inadmissible hearsay

evidence prior to the trial judge's determination, based on proof aliunde, that reasonable grounds existed for the belief of a conspiracy, and the belief that Petitioner was a part of that conspiracy.

Several times during this trial, the trial court gave cautionary instructions to the jury as to the admissibility of hearsay evidence. But here it is obvious that hearsay evidence was the majority of the evidence allowed in, and as the court in *Geaney*, supra, stated, "when hearsay evidence is so large a portion of the proof as to render a cautionary instruction of doubtful utility, the trial court upon appellant's request, must declare a mistrial.

On September 30, 1975, in the United States District Court for the Southern District of West Virginia, the United States Attorney presented a motion to dismiss Count One against the Defendant, Grady Quicksey. The reasons cited for the motion were the critical medical conditions of the Defendant and the prohibitial cost in transporting the Defendant to Charleston, West Virginia, from Springfield, Missouri.

It is contended that the above reasons lack merit, the Defendants state of health is the same as it was when he was forced to stand trial in January, 1974, over his objections and those of his personal physicians. Also, the cost of Two Thousand Dollars ($2,000.00) as mentioned by the United States Attorney, is not a great price at all when weighed against the rights afforded one in a criminal trial under the American system of justice.

Defendant has contended all the while, that the conspiracy charge under Count One allowed inadmissible hearsay evidence to be admitted at the trial, which inadmissible evidence contributed greatly to Defendant's being found guilty on the remaining eight counts.

Count One was the heart of the prosecutor's case, and now after placing such heavy emphasis on Count One, the Government now wishes to dismiss this very charge. However, it should be noted that this motion to dismiss

comes only after the Government successfully prosecuted the other eight counts.

Seemingly, the question is "what is to prevent the Government from prosecuting under a conspiracy statute, obtaining convictions on other related counts, and later dismissing the conspiracy charge, which charge allowed inadmissible evidence to be admitted at trial and without which charge, the evidence would have been inadmissible?"

The only possible answer is the integrity of the Government prosecutor; but in this day and time, American citizens need more protection from spurrious criminal charges than the integrity of ambituous men in Government.

Therefore, Defendant prays that if this motion to dismiss is granted, then the remaining eight counts should also be dismissed.

SECOND: DID THE COURT ERR IN REFUSING PETITIONERS MOTION TO DISMISS COUNT NINE BASED ON THE GOVERNMENT'S FAILURE TO PROVE A MATERIAL ELEMENT?

The court in his charge to the jury said that the identity of heroin may be proved circumstantially and it need not be proven directly. However, Julia Monroe, a confessed drug addict, testifying for the government stated emphatically several times that it was not heroin but cocaine that she bought back. And the fact that Mrs. Monroe tried some of the same substance in question and based on experience, described the difference in effects of heroin and cocaine, should have left no room for the jury to infer that the substance was heroin rather than cocaine as Mrs. Monroe testified. Therefore, there was no way for the jury to infer from the circumstances that the substance in question was heroin. Also, the trend toward recognizing experts based on experience as well as education would make Mrs. Monroe's statement that the substance was cocaine and not heroin, expert testimony.

As Mrs. Monroe's testimony is the only evidence offered

on Count 9 (transporting Heroin interstate), which testimony proved the substance in question to be different than that alleged in the indictment, the appellant respectfully prays that the conviction on count 9 be reversed, for failure to prove a material element of the offense.

Though the sentence under Count 9, of 5 years, is to run concurrently with Count 1, and issues concerning appellant's conviction of a count where the sentence is to run concurrently with that of a valid conviction have been found by the Courts to be moot, *U.S. v Tager*, 479 f2d 120 (1973), *U.S. v Crouch*, C.A. Cal. 1971, 442 f2d 427, here the appellant prays for reversal because of a separate imposition of a Ten Thousand Dollar ($10,000) fine.

THIRD: DID THE COURT ERR BY REFUSING PETITIONER'S MOTION TO DISMISS COUNT TEN, BASED ON INSUFFICIENCY OF EVIDENCE.

Appellant was convicted on count ten under Title 21, Section 848, continuing criminal enterprise. One of the essential elements of Title 21, Section 848, is that the activity must be one from which the appellant secures a substantial amount of income or resources. The Legislative history of P1. 91-513, on which count 10 is based, defines a substantial source of income as a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and fifty-week year . . . . . , and which for the same period exceeds fifty percent of the appellants declared adjusted gross income under *Section 62 of The Internal Revenue Code of 1959*. (Adjusted gross equals gross income minus deductions.)

Title 21, Section 848 (b) defines continuing criminal enterprise and subsection (b) (2) (B) has in the conjunctive "from which such person obtains substantial income or resources." Cases interpreting this section are practically non-existent. However, in *U.S. v Manfredi*, 488 f2d (2nd Cir. 1973), the defendant Manfredi was convicted on Title

21, Section 848, and on appeal the conviction was affirmed. But there, evidence was introduced to show the defendant a drug dealer, received an estimated one million dollars from one of several narcotic distributors within a seventeen month period. That evidence in and of itself was enough to prove necessary element in Title 21, Section 848, (b) (2) (B), "substantial income or resources." But in this case, the government offered no such evidence and did not show or prove that appellant's acts fell within the purview of Title 21, Section 848. Evidence must be offered on each separate element of a crime and in this case, this important element was totally ignored by the government. The conviction must not be allowed to stand when the evidence on which the conviction is based is insufficient.

It is impossible to determine why the government did not put into evidence appellant's previous years adjusted gross income. With the tremendous weight and power of the government it would have been a simple matter to subpoena both appellant's tax records and his accountant. But instead, the government chose to ignore his previous years adjusted gross income. But Title 21, Section 848, on which count ten is based, states that the substantial amount of income or resource must exceed fifty per cent of the appellant's adjusted gross income. Appellant concedes that some money amounts were put in evidence but appellant contends that it is logically impossible to determine whether these sums mentioned exceeded fifty per cent of his gross adjusted income, when no one knew his adjusted gross income. In any event, even if the jury did so infer, the conviction on count ten must be reversed because there was no logical base for so inferring.

While a reversal on the count will not numerically reduce the sentence, it will reduce the fine appellant is to pay and it will remove the prohibition of the application of *Title 18, Section 4202*, thereby making appellant eligible for parole.

Therefore, the appellant prays the conviction on count

ten be overturned because of the government's failure to submit evidence as to an important element of the crime from which the jury could logically infer guilt on that particular count.

CONCLUSION

Petitioner was convicted by a jury on inadmissible hearsay testimony of unindicted co-conspirators. This testimony was allowed in evidence prior to the court's determination, based on proof aliunde, that a conspiracy in fact existed and of Petitioner being a part of that conspiracy. This "opening of the flood gates" allowed inadmissible testimony which eventully resulted in Petitioners conviction on the counts. Petitioner was not convicted on admissible evidence. Petitioner therefore prays that this Petition for a Writ of Certiorari be granted.

By William L. Lonesome
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APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74-1559

United States of America, Appellee,
-v-
Grady Quicksey, Appellant.

No. 74-1560

United States of America, Appellee,
-v-
Mary Jane Quicksey, Appellant,

No. 74-1561

United States of America, Appellee,
-v-
Alfred Dumeur, Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Bluefield. K. K. Hall, District Judge.

Argued January 10, 1975. Decided July 25, 1975

Before HAYNSWORTH, Chief Judge, and BUTZNER and WIDENER, Circuit Judges.

William L. Lonesome for Grady Quicksey; Chester Lovett (James T. Cooper on brief) for Mary Jane Quicksey; Hertbert H. Henderson [Court-appointed counsel] for Alfred Dumeur; John A. Field, III, United States Attorney for the Southern District of West Virginia (Robert B. King, Ray L. Hampton, II, and Frank E. Jolliffe, Assistant United States Attorneys, on brief) for Appellee.

BUTZNER, Circuit Judge:

Grady Quicksey, Mary Jane Quickesy, and Alfred Dumeur appeal from a judgment convicting them in Count I of a multicount indictment of conspiring to violate the Travel Act, 18 U.S.C. § 1952, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 841 and 846. With respect to this count, we shall withhold judgment for thirty days to allow the goverment to consider whether to consent to a resentencing. Should the government not consent, we shall vacate their convictions and remand for a new trial on Count I.

I

Title 21 U.S.C. § 841 (a) (1) provides in part that it is unlawful to distribute narcotics or to possess these drugs with intent to distribute them. Section 846 punishes a conspiracy to violate § 841 (a) (1) by a maximum sentence of fifteen years' imprisonment or a maximum fine of $25,000, or both, for a first offender, and by more severe penalties for repeating offenders.

Title 18 U.S.C. § 1952 forbids interstate travel with intent "to promote, manage, establish, carry on, or facilitate" any business enterprise involving narcotics. A conspiracy to violate § 1952 is punishable under the general conspiracy statute, 18 U.S.C. § 371, by a maximum term of five years' imprisonment or a maximum fine of $10,000, or both.

Count I of the indictment charged that the defendants

conspired to violate both 18 U.S.C. § 1952 and 21 U.S.C. § 841 (a) (1). In a bill of particulars the government indicated that Count I charged a violation of only the narcotics conspiracy statute, 21 U.S.C. § 846, but during trial the district attorney insisted that both this statute and 18 U.S.C. § 371 were applicable. The district court accepted this expanded interpretation of the indictment and denied the defendant's motion to require the government to elect at the conclusion of its case whether it was proceeding under the general conspiracy statute, § 371, or the special conspiracy statute, § 846. Thus, the law of the case allowed the jury to convict for either a general conspiracy or a narcotics conspiracy, but it was not required to return a special verdict. The court instructed the jury that it could convict if it believed the defendants engaged in a conspiracy involving interstate travel in connection with the possession of narcotics.[1]

The jury found all the defendants guilty under Count I without specifying whether they were guilty of a general

[1]Instructing the jury, the district court explained the charge of conspiracy as follows:

"Count one of the indictment charges [that] all four of the defendants . . . engaged in an unlawful activity — a conspiracy involving interstate travel in connection with the possession and distribution of Narcotic Drug Controlled Substance, in this case heroin. The indictment in part contains the following language:

"It was a part of said conspiracy that the said defendants and co-conspirators would and did unlawfully, knowingly, and intentionally distribute and possess with the intent to distribute . . . heroin . . . in violation of Title 21, United States Code, Sections 812 and 841 (a) (1).

"It was further a part of said conspiracy — and I am still reading from the indictment — that the said defendants and co-conspirators would and did, intentionally and knowingly, travel and cause travel between the Southern District of West Virginia and New York City, and elsewhere beyond the State of West Virginia, with intent to promote, manage, establish, and carry on and to facilitate the promotion, management, establishment, and carrying on of an unlawful activity, said unlawful activity being a business enterprise involving . . . heroin; in violation of Title 18, United States Code, Section 1952."

Later in the charge, the district court said:

"If the jury should find beyond a reasonable doubt from the evidence in the case that existence of the conspiracy charged in the indictment has been proved, and that during the existence of the conspiracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy, then proof of the conspiracy offense charged is complete."

conspiracy under § 371 or a special conspiracy under § 846. Before sentencing, the defendants argued that they could not be punished under a general verdict on Count I, or at most they were subject to a five-year sentence and a $10,000 fine under § 371. The court, however, rejected their contentions and imposed prison terms under § 846 in excess of five years and fines in excess of $10,000.

On appeal the defendants reiterate that Count I must be dismissed because it charged them with violating two separate conspiracy statutes; alternatively, they contend that they cannot be sentenced under a general verdict or at the most they can be sentenced only under the general conspiracy statute, § 371, and not under the special narcotics conspiracy statute, § 846. The government contends that the evidence was sufficient to justify conviction for a conspiracy to violate the drug laws and that consequently the sentences authorized by § 846 were proper.

We find no reason to dismiss Count I, for it was not duplicitous. The essential element of a conspiracy is an agreement, and it may embrace the commission of several substantive offenses. The reference to different conspiracy statutes does not necessarily charge more than one agreement, but it causes confusion by authorizing inconsistent penalties. *See* United States v. Amato, 367 F.Supp. 547, 549 (S.D. N.Y. 1973); 8 Moore, Federal Practice ¶ 8.03. It is clear that the evidence is sufficient to sustain a conviction for conspiracy under § 371 to violate the Travel Act, and it may well be, as the government suggests, that the evidence was sufficient to convict for a conspiracy to violate the Drug Act. But the court refused the defendants' motion to require the government to elect which statute it was relying on, and the jury was instructed that it could find guilt under Count I if it believed the defendants conspired to violate the Travel Act with intention of facilitating a business involving nacotics. Indeed, the court's charge may have led the jury to believe this was the gravamen of Count I. In any event, in the absence of a special verdict, it is not possible to ascertain whether the

jury intended to find the defendants guilty of conspiracy to violate the Travel Act or the Drug Act, or both Acts.

Because of this ambiguity, we withhold our judgment as to Count I for thirty days. If the government within that time consents to a resentencing under § 371 by notifying this court, we shall affirm their convictions on that count and remand for sentencing. If, on the other hand, the government does not consent, we shall vacate their convictions and remand for a new trial.[2] *See* Brown v. United States, 299 F.2d 438 (D.C. Cir. 1962).

Grady Quicksey, the only defendant charged with substantive offenses, contends that there was a fatal variance between the dates of the offenses alleged in the indictment and the dates disclosed by the evidence in Counts II, IV, V, and VI. He also complains of a variance in Count IX which charged he violated the Travel Act in July 1972 by having an accomplice travel between New York and West Virginia to promote a narcotics business involving heroin. The principal witness to this transaction was the accomplice, who testified that the drug she transported for Quicksey was cocaine, not heroin. No other witness identified the drug.

Rule 52(a) of the Federal Rules of Criminal Procedure requires us to disregard a variance which does not affect substantial rights of the accused. The test of substaniality is found in Berger v. United States, 295 U.S. 78, 82 (1935), which requires:

> "(1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense."

[2]In view of our ruling, we need not decide Dumeur's protest that the government's failure to comply with 21 U.S.C. § 851 precluded sentencing him as a second offender under 21 U.S.C. § 841 (b) (1) (A). *See* United States v. Noland, 495 F.2d 529 (5th Cir. 1974). If Dumeur's conviction for conspiring to violate the Travel Act is not disturbed and he is sentenced under the general conspiracy statute, 18 U.S.C. § 371, he cannot be subjected to the enhanced penalty provided by 21 U.S.C. § 841 (b) (1) (A) as a second offender. On the other hand, if the government elects to retry him for violating the narcotics conspiracy statute, 21 U.S.C. § 846, the information required by 21 U.S.C. § 851 has already been timely filed.

Berger also teaches that if, upon examination of the entire record, the variance does not appear to have caused prejudice, the error must be regarded as harmless.

The record discloses no prejudice. The transactions mentioned in Counts II, IV, V, and VI could be readily identified from other allegations without reference to the exact dates. Thus, Quicksey was fairly apprised of the charges. Furthermore, the record depicts the offenses in such unique detail that he is protected from subsequent prosecutions for the same crimes. The district judge committed no error by denying motions for a judgment of acquittal because of the variance in the dates. *Cf.* United States v. Covington, 411 F.2d 1087 (4th Cir. 1969).

Similarly, we find no prejudice in the variance between the allegation of heroin and proof of cocaine in Count IX. Both drugs are narcotics. The gist of the charge in Count IX is engaging in interstate travel to promote a narcotics business. The type of narcotics is immaterial, unless Quicksey was misled and taken by surprise or unless he could not be protected against subsequent prosecution.

Count IX fully informed Quicksey of the specific offense with which he was charged by allegations that named his accomplice and described the interstate travel as taking place between West Virginia and New York. The evidence disclosed that this was the only trip of this nature made by the accomplice, that heroin and cocaine in the form in which they were transported are similar in appearance, and that Quicksey did not even mention the name of the drug when he commissioned its transportation for his narcotics business.[3] Thus, it is apparent that Quicksey was fully informed of the material details of the interstate travel for which he was charged, and that the trip was so unique that he could not be prosecuted again for the same offense. We conclude, therefore, that no prejudice has been shown and that no error was committed in denying his motion for a judgment of acquittal on Count IX because of the variance. *Cf.* United States v. Ramirez, 482

[3]The accomplice decided that the drug was cocaine after taking some of it. No other evidence identified it.

F.2d 807, 817 (2d Cir. 1973); United States v. Schrenzel, 462 F.2d 765, 769 (8th Cir. 1972).

We find no cause for reversal in Grady Quicksey's other assignments of error to be substantive counts.

Entry of judgment is temporarily withheld.

HAYNSWORTH, Chief Judge, Concurring and Dissenting:

I concur in Part II of the court's opinion but dissent from the conditional requirement of resentencing or, in the alternative, a remand for a new trial.

It is unfortunate, of course, that the indictment contained any reference to the Travel Act and § 371. It is still more unfortunate that the District Attorney insisted upon, and the court granted, instructions based upon those statutes. We do not proceed in a vacuum, however, and it seems to me to be our duty to look at the evidence and the instructions actually given to determine whether the confusion engendered creates any substantial doubt that the jury found the defendants guilty under the Drug Act or whether the confusion otherwise disadvantaged the defendants. I think it did neither.

The prosecution was based upon evidence that the defendants were engaged in a conspiracy to purchase at wholesale large quantities of heroin and to distribute it at retail in West Virginia. The proof included interstate transactions in connection with the purchase and importation of drugs into West Virginia, but there was no proof that the defendants were engaged in any other unlawful conspiracy which was not violative of the Drug Act but which was a violation of the Travel Act and § 371.

The instructions to the jury, while including a requirement of interstate travel, made it perfectly clear and explicit that the purpose of the conspiracy was the importation and distribution of heroin. Indeed, the judge quoted that part of the indictment which charged that the purpose of the conspiracy, at least for a time, was ac-

complished by the actual importation and distribution of heroin.

Under these circumstances, the jury could not have found the defendants guilty of a violation of the Travel Act or § 371 without having found the defendants guilty under § 846, the special narcotics conspiracy statute. No other conspiracy was charged or proven. The charge did require the jury to find not only a violation of § 846 but interstate travel as well, but that requirement simply increased the prosecution's burden. It could not have prejudiced the defendants in their defense, nor did it inject an element of unfairness to them in the judge's submission to the jury. The only party hurt by the confusing references to the extraneous statutes was the United States, and it asked for it and may not complain.

Under these circumstances, *Brown v. United States*, D.C. Cir., 299 F.2d 438, is simply inapplicable. There the indictment charged a conspiracy to violate four separate statutes, one of which was punishable only under § 371 while the other three had their own conspiracy prohibitions with higher maximum penalties. There was a general submission to the jury and a general finding of guilt, and, from the court's opinion, it appears entirely possible that the jury may have found the defendants guilty of a conspiracy to violate only 18 U.S.C.A. § 1403, the one punishable only under § 371.[1] Here, on the other hand, as I have attempted to demonstrate, the jury simply could not have found that the defendants were innocent of a conspiracy to violate the Drug Act but guilty of a conspiracy to violate the Travel Act. The jury was not told of any differences in the penalties or varying consequences

[1]Section 1403 proscribes the use of a communication facility in committing or attempting to commit, or in causing or facilitating the commission of an offense or a conspiracy to commit an offense under other statutes relating to the sale and importation of narcotics and their possession on certain vessels, aircraft and vehicles on international journeys. We do not have the benefit of the testimony in *Brown*, but it well may be that the jury reasonably could have found him guilty of the use of a telephone in an attempt to commit an offense under one of the enumerated statutes without having been a member of a conspiracy involving the sale or importation of narcotics, to which the other statutes charged in the indictment related. This must have been so or the court would not have said it could not tell what the jury found. Here, we can.

which might flow from a conviction of one offense rather than the other, so that there is no possiblility that it made a distinction or undertook to exercise its discretion to convict of a lesser offense, though convinced beyond a reasonable doubt of the defendants' guilt of a greater offense. Indeed, the jury was told the indictment charged only a single offense, a conspiracy to distribute heroin in which interstate travel was also involved. Since the jury must have found every element of the offense under the Drug Act to have brought in any verdict of guilty, there is no room for speculation that the jury may not have thought the defendants guilty of that offense.

I would treat the references to the Travel Act and the general conspiracy section as mere surplusage. We did that in *Davis v. United States*, 4th Cir., 279 F.2d 576, where there was a miscitation of the general conspiracy statute in the indictment. We held that the miscitation did not preclude sentencing under the harsher narcotic laws.[2] Here there was more than a miscitation in the indictment, for the matter got into the judge's instructions to the jury. When the charge, in light of the evidence, however, leaves no room for speculation that the jury brought in its verdict of guilty without having found the defendants guilty of a conspiracy under the Drug Act, I think the principle of *Davis* controls rather than the principle of *Brown*, which depends upon real uncertainty as to what the jury did find, an uncertainty not present here.

For these reasons, I respectfully dissent.

[2]Our holding in Davis has been frequently followed. *United States v. Bates*, 429 F.2d 557 (9th Cir.), *cert. denied*, 400 U.S. 831, 916 (1970); *Tanksley v. United States*, 321 F.2d 647 (8th Cir. 1963); *United States v. Galgano*, 281 F.2d 908 (2d Cir. 1960), *cert. denied*, 366 U.S. 960 (1961).

APPENDIX II

Title 18, Section 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c.645, 62 Stat. 701.

Title 21, Section 812. Schedules of controlled substance-Establishment

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semi annual basis during the two-year period beginning one year after the date of enactment of this sub-chapter and shall be updated and republished on an annual basis thereafter.

(b) Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on the effective date of this part, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) Schedule I. —

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

(2) Schedule II. —

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

(3) Schedule III. —

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

(4) Schedule IV. —

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.

(5) Schedule V. —

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV.

(B) The drug or other substance has a currently

accepted medical use in treatment in the United States.

(C) The abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.

(c) Schedules I, II, III, IV and V shall, unless and until amended pursuant to section 811 of this title consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

SCHEDULE I

(a) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Acetylmethadol.
(2) Allylprodine.
(3) Alphacetylmathadol.
(4) Alphameprodine.
(5) Alphamethadol.
(6) Benzethidine.
(7) Betacetylmethadol.
(8) Betameprodine.
(9) Betamethadol.
(10) Betaprodine.
(11) Clonitazene.
(12) Dextromoramide.
(13) Dextrorphan.
(14) Diampromide.
(15) Diethylthiambutene.
(16) Dimenoxadol.
(17) Dimepheptanol.
(18) Dimethylthiambutene.
(19) Dioxaphetyl butyrate.
(20) Dipipanone.
(21) Ethylmethylthiambutene.
(22) Etonitazene.

(23) Etoxeridine.
(24) Furethidine.
(25) Hydroxypethidine.
(26) Ketobemidone.
(27) Levomoramide.
(28) Levophenacylmorphan.
(29) Morpheridine.
(30) Noracymethadol.
(31) Norlevorphanol.
(32) Normethadone.
(33) Norpipanone.
(34) Phenadoxone.
(35) Phenampromide.
(36) Phenomorphan.
(37) Phenoperidine.
(38) Piritramide.
(39) Proheptazine.
(40) Properidine.
(41) Racemoramide.
(42) Trimeperidine.

(b) Unless specifically excepted or unless listed in another schedule, any of the following opium derivatives, their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Acetorphine.
(2) Acetyldihydrocodeine.
(3) Benzylmorphine.
(4) Codeine methylbromide.
(5) Codeine-N-Oxide.
(6) Cyprenorphine.
(7) Desomorphine.
(8) Etorphine.
(9) Dihydromorphine.
(10) Heroin.
(11) Hydromorphinol.
(12) Methyldesorphine.
(13) Methylhydromorphine.
(14) Morphine methylbromide.
(15) Morphine methylsulfonate.
(16) Morphine-N-Oxide.
(17) Myrophine.
(18) Nicocodeine.

(19) Nicomorphine.
(20) Normorphine.
(21) Pholcodine.
(22) Thebacon.

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) 3, 4-methylenedioxy amphetamine.
(2) 5-methoxy-3, 4-methylenedioxy amphetamine.
(3) 3, 4, 5-trimethoxy amphetamine.
(4) Bufotenine.
(5) Diethyltryptamine.
(6) Dimethyltryptamine.
(7) 4-methyl-2, 5-dimethoxyamphetamine.
(8) Ibogaine.
(9) Lysergic acid diethylamide.
(10) Marihuana.
(11) Mescaline.
(12) Peyote.
(13) N-ethyl-3-piperidyl benzilate.
(14) N-methyl-3-piperidyl benzilate.
(15) Psilocybin.
(16) Psilocyn.
(17) Tetrahydrocannabinols.

SCHEDULE II

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound derivative, or preparation of opium or opiate.

(2) Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical

with any of the substances referred to in clause (1), except that these substances shall not include the isopuinoline alkaloids of opium.

(3) Opium poppy and and poppy straw.

(4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

(b) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts and salts of isomers, esters and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Alphaprodine.
(2) Anileridine.
(3) Bezitramide.
(4) Dihydrocodeine.
(5) Diphenoxylate.
(6) Fentanyl.
(7) Isomethadone.
(8) Levomethorphan.
(9) Levorphanol.
(10) Metazocine.
(11) Methadone.
(12) Methadone-Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane.
(13) Moramide-Intermediate, 2-methyl-3-morpholino-1, 1-diphenylpropane-carboxylic acid.
(14) Pethidine.
(15) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine.
(16) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate.
(17) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid.
(18) Phenazocine.
(19) Piminodine.

(20) Racemethorphan.
(21) Racemorphan.

(c) Unless specifically excepted or unless listed in another schedule, any injectable liquid which contain any quantity of methamphetamine, including its salts, isomers, and salts of isomers.

SCHEDULE III

(a) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers.

(2) Phenmetrazine and its salts.

(3) Any substance (except an injectable liquid) which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers.

(4) Methylphenidate.

(b) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system.

(1) Any substance which contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid.

(2) Chorhexadol.
(3) Glutethimide.
(4) Lysergic acid.
(5) Lysergic acid amide.
(6) Methyprylon.
(7) Phencyclidine.
(8) Sulfondiethylmethane.
(9) Sulfonethylmethane.
(10) Sulfonmethane.

(c) Nalorphine.

(d) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:

(1) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium.

(2) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 miligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amount.

(3) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity or an isoquinoline alkaloid of opium.

(4) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(5) Not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(6) Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(7) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active nonnarcotic ingredients in recognized therapeutic amounts.

(8) Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

SCHEDULE IV

(1) Barbital.
(2) Chloral betaine.
(3) Chloral hydrate.
(4) Ethchlorvynol.
(5) Ethinamate.
(6) Methohexital.
(7) Meprobamate.
(8) Methylphenobarbital.
(9) Paraldehyde.
(10) Petrichloral.
(11) Phenobarbital.

SCHEDULE V

Any compound, mixture, or preparation containing any of the following limited quantities of narcotic drugs, which shall include one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

(1) Not more than 200 milligrams of codeine per 100 milliliters or per 100 grams.

(2) Not more than 100 milligrams of dihydrocodeine per 100 milliliters or per 100 grams.

(3) Not more than 100 milligrams of ethylmorphine per 100 milliliters or per 100 grams.

(4) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit.

(5) Not more than 100 miligrams of opium per 100 milliliters or per 100 grams.

(d) The Attorney General may by regulation except any compound, mixture, or preparation containing any depressant or stimulant substance in paragraph (a) or (b) of schedule III or in schedule IV or V from the application of all or any part of this subchapter if (1) the compound, mixture, or preparation contains one or more active

medicinal ingredients not having a depressant or stimulant effect on the central nervous system, and (2) such ingredients are included therein in such combinations, quantity, proportion, or concentration as to vitiate the potential for abuse of the substances which do have a depressant or stimulant effect on the central nervous system.
Pub. L. 91-513, Title II, Section 202, Oct. 27, 1970, 84 Stat. 1247.

Title 21, Section 841. Prohibited acts A-Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior con-

viction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any contolled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant, substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $20,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there

was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $3,500.00 or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(4) Notwithstanding paragraph (1) (B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

(c) A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

Pub. L. 91-513, Title II, Section 401, Oct. 27, 1970, 84 Stat. 1260.

Title 21, Section 848. Continuing criminal enterprise — Penalties; forfeitures

(a) (1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of im-

prisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States:

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if:

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter:

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1932 (D.C. Code, secs. 24-203 to 24-207), shall not apply.

(d) The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a) of this section) shall have jurisdiction to enter such restraining orders or prohibitions, or to have such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper. Pub. L. 91-513, Title II, Section 408, Oct. 27, 1970, 84 Stat. 1265.

APPENDIX III

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BLUEFIELD

UNITED STATES OF AMERICA

v. Criminal No. 73-67-BL

GRADY QUICKSEY, also known as "Son"

MOTION TO DISMISS

Now comes the United States of America and moves this Honorable Court for an Order dismissing Count One of the indictment as it applies to Grady Quicksey, and in support of said motion, sets forth and alleges as follows:

(1) That on February 5, 1974, Grady Quicksey was found guilty on nine separate counts of conspiracy to distribute heroin, travel in interstate commerce in futherance of an illegal narcotics business enterprise and illegal distribution of heroin in the Southern District of West Virginia, as well as a violation of engaging in a continuing criminal enterprise as the kingpin of said enterprise.

(2) During the sentencing in this case the Court sentenced Grady Quicksey to fifteen years imprisonment on Count One, the conspiracy count of the indictment.

The Court also sentenced Grady Quicksey on Count Six to fifteen years imprisonment concurrent with Count One of the indictment.

(3) By Order of the United States Court of Appeals for the Fourth Circuit, Mr. Quicksey was ordered re-sentenced under Count One to a term of imprisonment not to exceed five years.

(4) Grady Quicksey is currently serving his sentence at the Federal Medical Facility at Springfield, Missouri, and is in critical condition suffering from heart disease, arteriosclerosis, and a lung ailment.

(5) The United States is advised that Mr. Quicksey cannot be returned to Charleston except on a private plane with doctor and nurse in attendance for the entire trip, and that such transportation will cost the United States in excess of Two Thousand Dollars ($2,000).

(6) Inasmuch as the resentencing does not affect in any way the time to be served by Quicksey, the return of Quicksey cannot be justified for the resentencing.

Accordingly, the United States moves this Court to dismiss said Count One of the indictment as it applies to Grady Quicksey.

UNITED STATES OF AMERICA
By:

JOHN A FIELD, III
United States Attorney

DATE: September 30, 1975

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-612

GRADY QUICKSEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his conviction on eight substantive counts improperly resulted from the introduction of hearsay declarations of his co-conspirators under a later dismissed conspiracy count. He further argues that the trial court erred in failing to dismiss two counts of the indictment for failure of proof.

After a jury trial in the United States District Court for the Southern District of West Virginia (C.A. App. 4), petitioner was convicted of conspiracy to distribute narcotics in violation of 21 U.S.C. 841(a)(1) and conspiracy to travel interstate with the intent to promote, manage or facilitate a business enterprise involving narcotics in violation of 18 U.S.C. 1952 (count one);[1] traveling interstate with intent to promote, manage or facilitate an

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[1]Mary Jane Quicksey, Beatrice Graves, Alfred Dumeur and Cora Moore were indicted along with petitioner on the conspiracy count only (count one). The jury returned verdicts of guilty against Dumeur and Mary Jane Quicksey and not guilty as to Graves; the indictment was dismissed as to Moore (C.A. App. 4-5).

unlawful narcotics enterprise and wilfully performing acts facilitating such activity, in violation of 18 U.S.C. 1952 (counts two, seven, eight and nine); distribution and possession with intent to distribute heroin, in violation of 21 U.S.C. 841(a)(1) (counts four, five and six); and managing and supervising an illegal narcotics business, in violation of 21 U.S.C. 848 (count ten).[2] Petitioner was sentenced to an aggregate of thirty years' imprisonment without parole, in addition to fines totalling $240,000 (C.A. App. 4). The court of appeals affirmed (Pet. App. 13-21).[3]

1. Count two of the indictment was based on evidence showing that, in the fall of 1971, petitioner made at least one trip to Buffalo, New York, where he obtained a large quantity of heroin (C.A. App. 117). A former heroin addict and salesman for petitioner, Deotis Brown, accompanied petitioner on this trip (*id.* at 90-91). At petitioner's trial, Brown testified that he took a portion of the heroin obtained by petitioner and that he distributed twenty to twenty-five bags of heroin for petitioner approximately three times a day (*id.* at 91, 100).

William O'Dell Harris, another drug salesman for petitioner, also testified at trial. Harris was given 200 bags of heroin by petitioner to "get rid of." He gave 100 bags to

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[2]The court entered a judgment of acquittal on count three before the case went to the jury.

[3]The court of appeals withheld judgment on the conspiracy count (count one) because of the ambiguity as to whether the jury had found the defendants guilty of conspiracy to violate the Travel Act (18 U.S.C. 1952), in violation of 18 U.S.C. 371, or of conspiracy to violate the narcotics laws, in violation of 21 U.S.C. 846 (Pet. App. 16-17). The trial court had imposed the greater sentences authorized by 21 U.S.C. 846. Thereafter, the conspiracy count of the indictment under which petitioner was indicted and convicted was dismissed as to him. This resulted in no reduction of the 30-year prison term but only in a $25,000 reduction in the fine, to a total of $215,000.

Deloris Middlebrooks and 100 bags to Hubert Tyler (count four). Petitioner was to receive $1,400 from the sale of this heroin, and Harris would receive $250 (*id.* at 132-134). On three or four other occasions, Harris received approximately fifty bags of heroin from petitioner (*id.* at 135). Harris then gave this heroin to Hubert Tyler and Nancy Joann Thompson for resale (count five) (*id.* at 137-138).

Alfonso "Buddy" Oliver, a named co-conspirator, testified that he had been a heroin salesman for petitioner for a period of time in 1972. On one occasion, Oliver received fifty bags of drugs from petitioner; after determining that the drugs were good, he obtained another 150 to 200 bags from petitioner (C.A. App. 290-291). Oliver was able to sell the bags in about a day and a half, and he gave petitioner approximately $1,500 to $1,800 from these sales (*id.* at 291). Oliver sold petitioner's narcotics for approximately six weeks; when the "dope" was good he would sell an average of 100 to 150 bags per day at ten dollars a bag (*id.* at 291-292). He gave the money he received from these sales to petitioner (*ibid.*).[4]

Marie Curtis, a named co-conspirator, was another witness at petitioner's trial. She testified that she had traveled to New York City in June of 1972; en route she stopped in Pittsburgh and spoke to petitioner by telephone (C.A. App. 338, 340-341). Petitioner told her to continue to New York and that he would fly there on the following day (*id.* at 341). The next day, Curtis picked up petitioner at the airport in New York. Thereafter, she telephoned Al Dumeur, whereupon Dumeur and petitioner discussed the purchase price of narcotics (*id.* at 344). Later, petitioner and Curtis proceeded to Dumeur's poolroom in Harlem, and petitioner entered a back room with Joseph "Jomo"

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[4]Heroin distribution in conjunction with Alfonso "Buddy" Oliver was charged against petitioner in count six of the indictment.

Curtis, a named co-conspirator, and Dumeur (*id.* at 345). Thereafter, Marie Curtis was given some "stuff" to carry back; at Lexington, Virginia, she gave the drugs to co-conspirator Mary Jane Quicksey (*id.* at 352).[5]

Sharon Lee Stamper, another named co-consipirator and trial witness, traveled from Charleston, West Virginia, to New York City in August of 1972 (C.A. App. 507-508, 510). She and Joseph "Jomo" Curtis purchased $1,200 worth of heroin with petitioner's money (*id.* at 513-514, 518-519). Stamper transported the heroin to Montgomery, Alabama, on a bus, while "Jomo" Curtis flew from New York to Montgomery (*id.* at 519-520). Curtis picked up Stamper in Montgomery, and they both proceeded to Charleston, West Virginia (*id.* at 520). The heroin purchased in New York was subsequently given to petitioner (*id.* at 521).[6]

In July of 1972, Julia Jean Monroe, a named co-conspirator who also testified for the prosecution, traveled from Beckley, West Virginia, to New York City, where she met petitioner (C.A. App. 645, 648). Thereafter, petioner gave Monroe a plastic bag containing drugs, which she inserted into a carrying case (*id.* at 650). Petitioner gave her some money for a bus ticket, and she took a bus from New York to Bluefield, West Virginia. From Bluefield, she proceeded by taxi to Beckley (*id.* at 651, 653). The narcotics in her possession were then delivered to petitioner's house (*id.* at 654).[7] On cross-examination, Julia

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[5]This trip pertained directly to count seven of the indictment, which charged a violation under the Travel Act (18 U.S.C. 1952).

[6]This evidence directly related to count eight of the indictment, which charged a violation under the Travel Act (18 U.S.C. 1952).

[7]This evidence related directly to count nine of the indictment, which charged petitioner with having an accomplice travel interstate between West Virginia and New York to promote a narcotics business involving heroin (C.A. App. 11).

Monroe testified that the drug picked up in New York was cocaine and not heroin (*id.* at 676).[8]

2. Petitioner contends that hearsay declarations of his co-conspirators were improperly introduced at trial because there was insufficient independent evidence of a conspiracy, and that this hearsay evidence improperly contributed to his conviction on the eight substantive offenses with which he was charged.

Significantly, petitioner does not point to a single specific example of allegedly inadmissible hearsay evidence used against him. Nor could he. For the testimony that we have summarized of William O'Dell Harris, Alfonso "Buddy" Oliver, Marie Curtis, Sharon Lee Stamper, Julia Jean Monroe and others was, for the most part, not hearsay at all but direct evidence of meetings, transactions and trips in which those witnessess had participated that supported both the conspiracy and substantive counts of the indictment. A review of the record demonstrates that this non-hearsay evidence was ample to establish the fact of a conspiracy and of petitioner's participation therein. Thus, the requirement that there be independent evidence of a conspiracy before hearsay statements of co-conspirators are admitted was fully satisfied in this case.

As for petitioner's claim that the hearsay evidence improperly contributed to his conviction on the substantive counts, it is established that the hearsay declarations would have been admissible even had petitioner been indicted only on the substantive counts, since there was independent proof, apart from any hearsay evidence, that he was engaged in a joint criminal venture. See, *e.g., United States* v. *Snyder*, 505 F.2d 595 (C.A. 5), certiorari denied, 420 U.S. 993; *United States* v. *Everidge*,

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[8] The evidence relating to count ten of the indictment is set out at pp. 7-8, *infra*.

488 F.2d 1 (C.A. 9); *Ottomano* v. *United States*, 468 F.2d 269, 273 (C.A. 1), certiorari denied, 409 U.S. 1128; *United States* v. *Binder*, 453 F.2d 805, 809 (C.A. 2), certiorari denied, 407 U.S. 920; *United States* v. *Hoffa*, 349 F.2d 20, 41 (C.A. 6), affirmed, 385 U.S. 293; *United States* v. *Annunziato*, 293 F.2d 373, 378-379 (C.A. 2), certiorari denied, 368 U.S. 919.

3. Petitioner's contention that the trial court erred in refusing to dismiss two counts of the indictment for failure of proof is likewise without merit.

a. Petitioner contends that the government failed to prove a material element under count nine, which charged him with violating the Travel Act in July of 1972 by having an accomplice (Julia Jean Monroe) travel between New York City and West Virginia to promote a narcotics business involving heroin. The principal witness to this transaction was the accomplice, who testified that the drug she transported for petitioner was cocaine, not heroin. No other witness identified the drug.[9] Petitioner asserts that this variance required dismissal of count nine, but the court of appeals correctly concluded (Pet. App. 18-19):

> We find no prejudice in the variance between the allegation of heroin and proof of cocaine in Count IX. Both drugs are narcotics. The gist of the charge in Count IX is engaging in interstate travel to promote a narcotics business. The type of narcotics is immaterial, unless Quicksey was misled and taken by surprise or unless he could not be protected against subsequent prosecution.
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> Count IX fully informed Quicksey of the specific offense with which he was charged by allegations

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[9]The evidence relating to this count is set out at pp. 4-5, *supra*.

> that named his accomplice and described the interstate travel as taking place between West Virginia and New York. The evidence disclosed that this was the only trip of this nature made by the accomplice, that heroin and cocaine in the form in which they were transported are similar in appearance, and that Quicksey did not even mention the name of the drug when he commissioned its transportation for his narcotics business. Thus, it is apparent that Quicksey was fully informed of the material details of the interstate travel for which he was charged, and that the trip was so unique that he could not be prosecuted again for the same offense. We conclude, therefore, that no prejudice has been shown and that no error was committed in denying his motion for a judgment of acquittal on Count IX because of the variance. *Cf. United States* v. *Ramirez,* 482 F.2d 807, 817 (2d Cir. 1973); *United States* v. *Schrenzel,* 462 F.2d 765, 769 (8th Cir. 1972). [Footnote omitted.]

b. Petitioner also claims that the trial court erred in failing to dismiss count ten of the indictment, which charged petitioner with engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848. Petitioner does not allege that there was insufficient evidence upon which the jury could have found that petitioner had engaged in a continuing criminal venture as the principal manager and supervisor, but he asserts that the government failed to prove an element of 21 U.S.C. 848, *viz.*, that he obtained "substantial income or resources" from this continuing illegal enterprise.

The record plainly reveals that petitioner did in fact derive substantial profit from this continuing criminal enterprise involving the distribution of narcotics. The evi-

dence established that petitioner was the central figure in a large-scale narcotics distribution network, that his narcotics salesmen were selling substantial quantities of narcotics daily (on many occasions more than 100 bags per day), that several trips were made out of state to purchase narcotics, and that large quantities of money changed hands. In these circumstances, the jury was fully justified in finding petitioner guilty of the substantive offense of engaging in a continuing criminal enterprise from which he derived "substantial income or resources." See *United States* v. *Sisca*, 503 F.2d 1337, 1346 (C.A. 2), certiorari denied, 419 U.S. 1008.[10]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

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[10]In support of his argument, petitioner suggests (Pet. 10) that "substantial income" as set forth in Section 848 means "a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and fifty-week year * * *, and which for the same period exceeds fifty percent of the appellants declared adjusted gross income under Section 62 of the Internal Revenue Code of 1959" (emphasis omitted). However, this is the definition of "substantial source of income" as set forth in 21 U.S.C. 849(e) and applicable to that Section alone. See *United States* v. *Collier*, 358 F. Supp. 1351, 1355-1356 (E. D. Mich.), affirmed, 493 F. 2d 327 (C.A. 6). Accordingly, petitioner's contention that the government failed to meet its burden of proof under Section 848 because it failed to introduce evidence of petitioner's adjusted gross income during previous years (Pet. 11) is without merit.